



Appellant contended that OWCP erred in terminating her wage-loss benefits and denying her hearing request as being untimely.

### **FACTUAL HISTORY**

On June 29, 2003 appellant, then a 49-year-old transportation security screener, filed a traumatic injury claim alleging that on that day she injured her hands while repeatedly lifting bags. OWCP accepted an occupational disease claim for bilateral hand and wrist tenosynovitis, which was subsequently expanded to include left bilateral carpal tunnel syndrome.<sup>2</sup> Appellant stopped work on November 1, 2003 and on February 5, 2004 OWCP placed her on the periodic rolls.

In a decision dated December 5, 2008, OWCP reduced appellant's compensation effective December 21, 2008 under 5 U.S.C. §§ 8106 and 8115 to reflect her capacity to earn wages in the constructed position of appointment clerk.

In a July 13, 2011 report, Dr. George M. White, a treating Board-certified orthopedic surgeon, diagnosed right tendinitis and left carpal tunnel syndrome. He released appellant to full-duty work with no restrictions. A physical examination revealed no swelling or ecchymoses, patchy areas of paresthesia with incomplete distal sensory loss and normal elbow, wrist and finger range of motion.

In a July 14, 2011 state treatment form, Dr. White diagnosed left carpal tunnel syndrome and right tendinitis. He checked that appellant had residuals of her employment injury, but no functional restrictions or limitations.

On August 17, 2011 Dr. White responded to OWCP's inquiry regarding appellant's current medical and disability status. He circled "yes" to the question of whether she was capable of performing the duties of her date-of-injury position as a transportation security screener with no limitations or restrictions.

On August 25, 2011 OWCP received Dr. White's modified July 13, 2011 report. The report was identical to his July 31, 2011 report but the restrictions were changed from "full duty no restrictions" to "no lifting over 25 pounds, no repetitive lifting, no repetitive pushing or pulling, no repetitive grasping or pinching and permanent restrictions.

On September 27, 2011 OWCP issued a notice of proposed reduction of its December 5, 2008 wage-earning capacity to zero and termination of appellant's wage-loss compensation based on Dr. White's July 13, 14 and August 17, 2011 findings.

On October 20, 2011 appellant disagreed with OWCP's September 27, 2011 proposal to terminate her wage-loss compensation and her ability to perform the duties of a transportation security screener.

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<sup>2</sup> OWCP adjudicated the claim as an occupational disease claim as the injury occurred over more than one workday or shift.

By decision dated November 30, 2011, OWCP terminated appellant's wage-loss compensation and modified its wage-earning capacity determination to reflect that she had no wage loss effective that date. It noted that her medical benefits were not terminated.

In a letter dated December 8, 2011, but not received by OWCP's Branch of Hearings and Review until March 13, 2012, appellant requested review of the written record before an OWCP hearing representative. In an accompanying letter, she explained that her original request for a review of the written record, which she claimed was dated December 18 and mailed by certified mail on December 23, 2011, had been returned to sender as undeliverable. As soon as it was returned to her, on March 5, 2012, appellant resubmitted it to OWCP. To support her claim, she submitted the original December 18, 2011 form requesting review of the written record by an OWCP hearing representative as well as the envelope that had been returned to her. A review of the envelope reflects that it was returned to sender on February 27, 2012 as being undeliverable due to an incomplete address for OWCP's Branch of Hearings and Review. There was no postmark identifying the date of mailing.

By decision dated May 8, 2012, OWCP denied appellant's request for review of the written record as untimely filed.

### **LEGAL PRECEDENT -- ISSUE 1**

Under FECA,<sup>3</sup> once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>4</sup> After it has determined that an employee has disability causally related to her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the work-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.<sup>7</sup> The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>8</sup>

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>6</sup> *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>7</sup> *See D.M.*, 59 ECAB 164 (2007); *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

<sup>8</sup> *Id.*; *Jack E. Rohrbaugh*, 38 ECAB 186 (1986).

## ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained bilateral hand and wrist tenosynovitis and left bilateral carpal tunnel as a result of her duties as a transportation security screener. Appellant stopped working for the employing establishment on November 1, 2003. In a December 5, 2008 decision, OWCP determined that her loss of wage-earning capacity was represented by the constructed position of appointment clerk. By its November 30, 2011 decision, it modified the loss of wage-earning capacity determination, finding that appellant had no employment-related disability and reduced the loss of wage-earning capacity determination to zero, thereby terminating her wage-loss benefits.

The Board finds that OWCP properly relied on the opinions of Dr. White, appellant's attending physician, that she ceased to have any disability due to her accepted conditions. In his July 13, 2011 report, Dr. White released appellant to full-duty work with no restrictions. He listed normal findings on physical examination with no swelling or ecchymoses and normal range of wrist, finger and elbow motion. In his July 14, 2011 treatment form, Dr. White checked that appellant had residuals of her employment injury, but no functional restrictions or limitations. In response to an August 17, 2011 OWCP request for clarification as to her current medical and disability status, Dr. White circled "yes" to the question of whether she was capable of performing the duties of a transportation security screener full time with no restrictions.

The Board, upon review of the opinions of Dr. White, notes that they have consistency, reliability, probative value and convincing quality with respect to the conclusions regarding the relevant issue of the present case. Dr. White's reports show that appellant ceased to have any disability due to her accepted work injuries and could perform full-duty work as a transportation security screener without limitations. He concluded that she had no functional restrictions or limitations based on her normal physical examination findings.

OWCP properly modified its December 5, 2008 loss of wage-capacity determination as there was sufficient evidence to establish a material change in the nature and extent of the employment-related conditions such that she was no longer disabled due to her accepted injuries.<sup>9</sup> The Board finds that it properly modified appellant's loss of wage-earning capacity to zero effective November 30, 2011.

On appeal, appellant contends that OWCP improperly terminated her wage-loss compensation benefits because Dr. White had modified his previous work restrictions in the later report received by OWCP on August 24, 2011. OWCP had provided Dr. White with a copy of appellant's job description and duties to determine her work capability and disability. The report from Dr. White which clarified to OWCP that appellant could perform her date-of-injury job duties with no restrictions was received by OWCP one day prior to the revised report. Dr. White's later modified July 13, 2011 report provided no rationale or explanation as to why he changed his opinion on appellant's work restrictions. This modified report is not sufficient, without more explanation, to overcome his three previously consistent reports finding that appellant could return to full duty with no restrictions.

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<sup>9</sup> See *supra* note 6.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8124(b)(1) of FECA provides that a claimant is entitled to a hearing before an OWCP representative when a request is made within 30 days after issuance of an OWCP final decision.<sup>10</sup> A claimant is not entitled to a hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request.<sup>11</sup> OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.<sup>12</sup> In such a case, it will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

A request for a hearing must, as noted above, be made within 30 days after the date of the issuance of OWCP's final decision. The same applies to requests for review of the written record by an OWCP hearing representative. Appellant's request for a review of the written record was received by OWCP on March 13, 2012. As the request was submitted more than 30 days following issuance of the November 30, 2011 decision, it was untimely filed.

Although appellant claims to have timely mailed her request for review of the written record, she submitted no evidence to establish a timely date of mailing. Although she contended that she mailed the form by certified mail on December 23, 2011, she did not provide any documentation, such as a return receipt, to support her contention and there was no date of mailing on the returned envelope.

OWCP also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right. The Board finds that OWCP, in its May 8, 2012 decision, properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request for a review of the written record on the basis that her claim could be addressed through a reconsideration application. The Board has held that, as the only limitation on OWCP's authority is reasonableness, and abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.<sup>14</sup> In the present case, OWCP properly denied appellant's request for a review of the written record.

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<sup>10</sup> 5 U.S.C. § 8124(b)(1). See *A.B.*, 58 ECAB 546 (2007); *Gerard F. Workinger*, 56 ECAB 259 (2005).

<sup>11</sup> 20 C.F.R. § 10.616(b).

<sup>12</sup> *Hubert Jones, Jr.*, 57 ECAB 467 (2006).

<sup>13</sup> *Teresa M. Valle*, 57 ECAB 542 (2006).

<sup>14</sup> *Id.*; *Daniel J. Perea*, 42 ECAB 214 (1990).

On appeal, appellant contends that she timely filed her request for a review of the written record before an OWCP hearing representative, but it had been returned to her as undeliverable. The evidence submitted by her does not establish that she had timely filed a request for a review of the written record within 30 days of issuance of OWCP's November 30, 2011 decision. Thus, the Board finds that OWCP properly denied appellant's request as being untimely.

**CONCLUSION**

The Board finds that OWCP met its burden of proof to modify its determination of appellant's wage-earning capacity to reduce it to zero and thus to terminate her wage-loss compensation effective November 30, 2011. The Board further finds that it properly denied appellant's request for an oral hearing as it was untimely filed.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 8, 2012 and November 30, 2011 are affirmed.

Issued: November 28, 2012  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board